

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In The Matter Of:

**GARDNER TRUCKING, INC.,
(U. S. DOT No. 733151)**

Petitioner

**Docket No. FMCSA-2010-0097
(Western Service Center)**

**DECISION ON PETITION FOR ADMINISTRATIVE REVIEW UNDER
49 CFR 385.15**

This matter comes before the Federal Motor Carrier Safety Administration (FMCSA) on a March 15, 2010 petition by Gardner Trucking, Inc. (Petitioner) for administrative review of an acute violation cited during a compliance review of its operations completed on October 23, 2009.¹ Petitioner received a satisfactory safety rating as a result of this compliance review.

Petitioner stated that although it was charged with violating the regulation in question in a Notice of Claim (NOC) dated November 19, 2009, it did not contest the claim and “simply paid the Civil Penalty...assuming that the Civil Penalty was a ‘nominal fine’.” Petitioner claimed that the NOC did not state that “there was going to be a severe effect upon the Gardner SafeStat Score if Gardner did not deny the Charge....” Petitioner subsequently learned that the cited violation increased its SafeStat score to a “deficient level” and claimed that had it known of these consequences, it would have contested the charge.² Petitioner contended that it did not know

¹ Although Petitioner did not cite the regulation by number, it described the acute violation that it was contesting as using a driver known to have tested positive for a controlled substance, which is a violation of 49 CFR 382.215.

² FMCSA’s Safety Status Measurement System (SafeStat) is an automated analysis system that combines current and historical safety performance data to guide the Agency’s deployment of resources to focus on carriers posing the greatest safety risk. SafeStat information is available to the public on the internet via FMCSA’s Analysis & Information Web site.

that the driver had tested positive for a controlled substance until after the driver had been dispatched and that it immediately removed the driver from the truck after it learned of the positive test result.

Under 49 CFR 385.15(a), a motor carrier may request administrative review if it believes FMCSA has committed an error in assigning a proposed or final safety rating, not to remove violations that may affect the carrier's SafeStat score but have no effect on its safety rating.³ Because Petitioner received a satisfactory safety rating, its request for administrative review does not fall within the scope of § 385.15 and is not reviewable by the Assistant Administrator.

To the extent the petition represents an attempt by Petitioner to reopen the enforcement case by filing a petition for reconsideration of a final agency order, it is also not reviewable. Under § 386.18(c) of the Agency's Rules of Practice, payment of the full amount of the civil penalty in response to an NOC constitutes an admission of all facts alleged in the NOC unless objected to in writing *at the time of payment*. Payment waives a carrier's opportunity to further contest the claim and will result in the NOC becoming the Final Agency Order. Petitioner did not submit a written objection at the time of payment—it waited more than three months before submitting such an objection in the form of its March 15, 2010 petition.⁴ Having waived its right to further contest the claim pursuant to § 386.18(c), it may not seek to challenge the charges in the NOC in a petition for reconsideration. Furthermore, because a petition for reconsideration of

³ See *In the Matter of CAPE Environmental Management, Inc.*, Docket No. FMCSA-2008-0322, Decision on Petition for Administrative Review under 49 CFR 385.15, February 23, 2009.

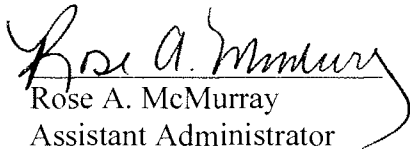
⁴ I hereby take official notice that FMCSA's Electronic Document Management System shows that Petitioner's payment of \$3,400 was received by the Western Service Center on or about December 1, 2009. At that time, the NOC became the Final Agency Order.

a final agency order must be filed within 20 days following service of the final agency order under § 386.64(a), the petition was not timely filed.

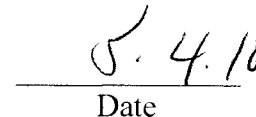
Finally, Petitioner's claim that FMCSA did not notify it that payment of the civil penalty could adversely affect its SafeStat score is not supported by the facts. The November 19, 2009 NOC expressly advised Petitioner, in bold face type, that:

"Payment of the penalty will constitute admission of the violation(s) set forth in the Notice of Claim and these violations shall constitute prior offenses...for violations of the Federal Motor Carrier Safety Regulations...unless you proceed under the provisions of 49 C.F.R. § 386.18(c). These offenses may lead to higher penalties in future enforcement actions and adverse SafeStat rankings." (Underlining supplied).⁵

Accordingly, *It Is Hereby Ordered*, the petition by Gardner Trucking, Inc., is denied.


Rose A. McMurray
Assistant Administrator

Federal Motor Carrier Safety Administration


Date

⁵ Notice of Claim, page 4. I hereby take official notice of the November 19, 2009 Notice of Claim, a copy of which is contained in FMCSA's Electronic Document Management System.

CERTIFICATE OF SERVICE

This is to certify that on this 5 day of May, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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